ONG THYE PENG

v.

LOO CHOO TENG & ORS

COURT OF APPEAL, KUALA LUMPUR
MOHD NOOR AHMAD JCA
RICHARD MALANJUM JCA
MOHD GHAZALI YUSOFF
[CIVIL APPEAL NO: P02-804-2000]
9 APRIL 2004

*[**Editor's note:** the following dissenting judgment delivered by Richard Malanjum JCA was not in the possession of the editors at the time when the majority judgments delivered by Mohd Noor Ahmad FCJ and Mohd Ghazali Yusoff JCA were reported in the CLJ vide [2004] 2 CLJ 458 (2004 May Part 2).]*

JUDGMENT

Richard Malanjum JCA (dissenting):
Before us is an appeal against the decision of the High Court Penang in relation to an application by way of originating summons for the following relief:

(a) that the plaintiffs be given permission to sell land previously known as Lot 532, Mukim 12, Daerah Barat Daya and now known as Lot 2347, 2348, 2349 and 2350 all in Mukim 12 Daerah Barat Daya, Penang ('the said land') pursuant to cl. 8 of the sale and purchase agreement between the plaintiffs and the first to fifth (and seventh) defendants dated 8 January 1979 and in accordance with the Probate and Administration Act 1959;

(b) that the permission as aforesaid be given to the plaintiffs to sell the said land to the first to fifth (and seventh) defendants abovenamed at the market value of the said land, at the date of approval by this honourable court or at such other price as this honourable court deems fit and proper.

Having heard the matter the learned High Court Judge granted the application for formal sanction with these words, *inter alia*, … 'formal sanction is hereby granted to the instant plaintiffs for the sale of the said land upon the terms of the agreement, namely at RM1.60 psf; all other 'permission' sought is refused, and the instant plaintiffs are to bear all costs of this application.'

From the above it is obvious that only the first prayer was granted. And the Appellant, who is also one of the beneficiaries of the estate of the deceased, the late Ong Joo Sun, ('the deceased') was in fact the 6th defendant in the court below. Dissatisfied with the decision of the learned judge the appellant now appeals.

I had the privilege of reading the majority judgments of the court in draft and having considered the reasoning and conclusion therein, with respect, I am unable to agree and thus inclined to give my dissenting view on the issues raised in this appeal.

The background facts of this case under appeal have been well-rehearsed in the majority judgment of my learned brother Mohd Ghazali Mohd Yusoff JCA. In any event there is hardly any dispute in them. Briefly this is a case involving the sale of land described as Lot 532, Mukim 12, Daerah Barat Daya and now known as Lot 2347, 2348, 2349 and 2350 all in Mukim 12 Daerah Barat Daya, Penang, ('the said land'). It belongs to the estate of the deceased who died testate. When proving his Will the High Court on 25 August 1975 directed, *inter alia*, that the deceased's estate be administered according to the terms of the Will and that his immoveable properties be sold and the proceeds be paid into court to the credit of his estate. But by a gazette notification No 103 published on 25 April 1974, the State Government of Penang declared its intention to acquire the said land.

On 8 January 1979, a sale and purchase agreement was entered into by the additional trustee of the deceased's estate, namely one Ong Thai Hong with the purchasers who are the respondents in this appeal. The purchase price was calculated at RM1.60 per square foot. A deposit of RM150,000 which was equivalent to approximately 5% of the total purchase price was paid by the purchasers at the date of the sale and purchase agreement. One Ong Gaik Kee (the 2nd respondent in this appeal) who was also appointed as an additional trustee executed the sale and purchase agreement on behalf of Ong Thai Hong.

Due to disagreement on the issue of whether the said land had been released from being earmarked for acquisition by the State Government a civil suit was launched by the purchasers against the additional trustees. The end result was that this court ('the first appeal') affirmed the decree of specific performance granted by the High Court of the sale and purchase agreement. However, having made the order, one issue was left, namely, the compliance of cl. 8 therein. That clause reads:

> The trustees shall also apply to court for a formal sanction to sell the property in accordance with the Probate and Administration Ordinance 1959.

And this court in the first appeal thus directed the compliance of that clause with these words:

> Having satisfied myself of the existence and the width of the jurisdiction in equity, I would vary the order of the learned judge by decreeing specific performance on terms that the vendors apply to court for formal sanction as provided in cl. 8 of the sale and purchase agreement. Such application shall be made not later than seven days from the date of this judgment. In the event the vendors make default, the plaintiffs shall be at liberty to seek approval from the court for the sale of the subject property to them. Should sanction be refused by the court, it would be open to the vendors to move for the decree to be vacated on the ground of impossibility of performance. Additionally, the parties are generally at liberty to apply to the High Court for such orders or directions as may be necessary to give effect to the decree hereby granted.

Meanwhile, in granting the sanction aforementioned the learned judge in the court below also said this, *inter alia*:

> But this is not really the instant plaintiffs' application, in the sense that the instant plaintiffs are eager applicants applying on their own volition for the said 'permission'. Rather, the instant plaintiffs were ordered by the Court of Appeal to make an application for formal sanction for the sale of the said land. Otherwise, for sure, this application would not have been made. If not for the order of the Court of Appeal, it is most unlikely that this application which ought to have been made but was never made by the instant plaintiffs in all these last 19 years would ever be made, would ever see the light of day.
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> ...
>
> Mr Abraham would not admit it, but clearly beyond all argument, the Court of Appeal who held that the agreement was a 'perfectly valid transaction', (also) decreed specific performance – and of what, 'of the vendors' obligations under the sale and purchase agreement' – albeit upon terms. The instant plaintiffs were ordered to apply to court for formal sanction for the sale of the said land upon the terms of the agreement. The term of the agreement was the sale of the said land at RM1.60 psf. It follows, that the instant plaintiffs should apply to court, or else would 'make default', for formal sanction for the sale of the said land at RM1.60 psf. The instant plaintiffs were not ordered, and so were not sanctioned by the Court of Appeal, to apply to court for formal sanction for the sale of the said land upon 'terms' alien to the agreement. After all, the equitable relief upon terms decreed – specific performance – was to enforce against the instant plaintiffs the duty of doing precisely what they agreed by the agreement to do (see *44 Halsbury's* (4th

Ed) para 401, and *Black's Law Dictionary* (7th Ed) on specific performance; see also *M Ratnavale v. S Lourdenadin; M Mahadevan v. S Lourdenadin* [1988] 2 MLJ 371 at p. 377).

...

Really, it is more than irrefragable that the decree of specific performance in the instant case could not have been, could never have been, to enforce 'terms' alien to the agreement. Rather, the plain and obvious effect of the decree of specific performance upon terms of the Court of Appeal is that, if sanction is obtained, the agreement shall be implemented exactly as was agreed by the parties, that is, at RM1.60 psf. 'Should sanction be refused by the court, it would be open to the (instant plaintiffs) to move for the decree to be vacated on the ground of impossibility of performance.' That is the pith of the decree of specific performance upon terms of the Court of Appeal who made it absolutely clear that the decree of specific performance of the High Court was varied but never set aside.

The instant plaintiffs were undoubtedly thrown a lifeline – 'should sanction be refused by the court, it would be open to the (instant plaintiffs) to move for the decree to be vacated on the ground of impossibility of performance'. But the instant plaintiffs have not taken that lifeline. Strictly speaking, there is no application for formal sanction to sell the said land upon the terms of the agreement. Only, this application 'for permission to sell the said land at the market value of the said land at the date of approval by this honourable court, or at such other price as this honourable court deems fit and proper'

…

If an application for formal sanction had been made in accordance with the agreement, there would have been no reason to refuse formal sanction. Formal sanction, as the Court of Appeal said, was '[a] mere formality ...'. Reasonably, formal sanction for the sale would not have not been given. That being the case, then on the alternate prayer of the instant plaintiffs for 'permission to sell at such other price as this honourable court deems fit and proper' (and that alternate prayer invites the court to grant formal sanction to sell upon the terms of the agreement), it is only just and equitable, so as to put the parties to the position had the agreement been performed as agreed, that formal sanction be granted for the sale of the said land upon the terms of the agreement. The reasons given for refusal of formal sanction are just not acceptable. This is not your usual run of the mill application for formal consent usually applied contemporaneously, and/or at or about the time of the proposed sale. If it is, then the current (year 2000) market value and the present objections to the price will be relevant. The agreed purchase price is not reflective of the current (year 2000) market value – how could it be and what would still be after 19 years of rapid economic development? – only

> because the instant plaintiffs, who fallaciously held that the agreement had become null and void when the acquisition was not withdrawn within two years from the execution of the agreement, would not apply no matter what, for formal sanction. However could the instant plaintiffs harbour hopes to profit? 'Wrong must not win by technicalities' (Aeschylus, The Eurnenides (458 BC) tr Richmond Lattimore) The instant plaintiffs must reap what they sow – the whirlwind.'

I have taken the liberty to reproduce as precisely as it could be done in an attempt to trace what was in the mind the learned judge before coming to his decision to grant the sanction on the term as he did.

Now, cl. 8 of the sale and purchase agreement gave due recognition to the 'Probate and Administration Ordinance 1959', now an Act ('the 1959 Act'). Hence, cl. 8 read with the 1959 Act was a term by itself to be complied with. It is not therefore surprising that this court in affirming the decree of specific performance said this:

> ... I would vary the order of the learned judge by decreeing specific performance on terms that the vendors apply to court for formal sanction as provided in cl 8 of the sale and purchase agreement.

Indeed in the judgment of this court in the first appeal his Lordship Gopal Sri Ram JCA observed that while the learned judge in the court below decreed specific performance of the sale and purchase agreement he '… failed to consider sufficiently, or at all, the effect of cl. 8 when exercising his discretion.'

Thus, the next question to ask is this: in law what is expected of the learned judge in the court below when considering an application for sanction as stipulated in cl. 8 of the sale and purchase agreement?

With respect, from the judgment of the learned judge in the court below it would appear that he was too preoccupied with and perhaps misconstrued what were said by this court in the first appeal. He completely ignored and failed to consider his primary function, namely to exercise his discretion judiciously, when considering the application for sanction made in compliance with cl. 8 of the sale and purchase agreement. At no time this court in the first appeal severed the relevant prerequisites of the 1959 Act from cl. 8.

No doubt in this case the deceased died testate. And when the Will was proved the trustees were empowered *vide* the Court Order to sell the immoveable properties of the estate of the deceased. But surely that could not mean complete freedom for the trustees to act in any manner as they wished. If that is the law then beneficiaries to an estate of a person who dies intestate have a better protection in view of the provisions of the 1959 Act and the judicial pronouncement of the law thereto. Thus, in the instant case the terms of the

Will should be observed. Additionally cl. 8 made specific reference to the 1959 Act which the parties to the sale and purchase agreement and the court below should not simply ignore.

In *Yap Yoke Luan & Ors v. Ong Wee Tok & Ors* [1984] 1 MLJ 23 a clause in the sale agreement of some pieces of land belonging to the estate of the deceased person stipulated that the administrators as the trustees of the estate must apply for leave from the court in order to finalize the sale. They failed to do so. Yet when leave was finally applied for by the purchasers after a lapse of seven years from the execution of the sale agreement the High Court and the then Federal Court approached the issue by stating that '(T)he duty of the court is to protect the rights of the beneficiaries and not to consider the interests of the proposed purchasers. In exercising its discretion the court will have to look into the facts and surrounding circumstances of the case ie, whether the proposed sale was favourable to the beneficiaries and whether the administrators had acted with proper prudence in exercising their overriding duty to obtain the best possible price. The court is concerned that the price is a reasonable one not at the time the offer was made but at the time of hearing the application for approval of the proposed sale.'

In the instant case cl. 8 of the sale and purchase agreement also stipulated that the trustees must apply for sanction from the court in accordance with the 1959 Act. As such it is my view that the primary function of the court below when exercising its discretion is to consider the interests of the beneficiaries to the estate of the deceased. Of course, there must be an exercise of discretion in the first place. Otherwise the intended purpose of cl. 8 would be rendered illusory.

Accordingly the ultimate question to ask is this: in this case did the learned judge in the court below exercise his discretion when considering the application and if so, was there a proper exercise according to law?

This court in its judgment in the first appeal clearly stated thus: '… Should sanction be refused by the court, it would be open to the vendors to move for the decree to be vacated on the ground of impossibility of performance.' The foregoing was a clear indication that proper exercise of discretion was expected from the learned judge. Hence, I do not think it was the intention of this court in the first appeal to stifle the discretion of the learned judge merely by the usage in the judgment of the words 'apply to court for formal sanction'.

Unfortunately the learned judge in the court below appeared to have taken that position when he said in his judgment these words:

> The instant plaintiffs were ordered to apply to court for formal sanction for the sale of the said land upon the terms of the agreement. The term of the agreement was the sale of the said land at RM1.60 psf. It follows, that the instant plaintiffs should apply to court, or else would 'make default', for formal sanction for the sale of the said land at RM1.60 psf. The instant plaintiffs were not ordered, and so were not sanctioned by the Court of Appeal, to apply to court for formal sanction for the sale of the said land upon 'terms' alien to the agreement.

In fact this court in the first appeal when affirming the decree of specific performance said this:

> I would vary the order of the learned judge by decreeing specific performance **on terms that** the vendors apply to court for formal sanction as provided in cl 8 of the sale and purchase agreement. (emphasis added).

With respect, I do not think those words of this court in the first appeal could, as understood by the learned judge in the court below to mean 'ordered to apply to court for formal sanction for the sale of the said land upon the terms of the agreement. The term of the agreement was the sale of the said land at RM1.60 psf.'. Hence, I have no reason to accept that he did exercise his discretion when granting the sanction as he did. And on this ground alone that I would allow this appeal, namely, the failure of the learned judge to exercise his discretion.

Even if the learned judge in the court below did exercise his discretion as contended, I am of the opinion that he did so not according to law. He took into account irrelevant matters or failed to take into account relevant matters. For instance, he held the view that he had no choice but to obey the decision of this court in that any sanction given should be reflective of the terms of the sale and purchase agreement particularly on the selling price of the said land. The learned judge also appeared to hold the view that the sanction to be given was a foregone conclusion. He failed to consider that refusal as indicated by this court in the first appeal was an option available to him.

And legal principle pertaining to an exercise of discretion was restated by this court in the first appeal in this fashion:

> I take it as settled law that the initial function of this court in a case as the present is one of review only. The fact that I may differ with the learned judge in the way discretion was exercised affords no ground to reverse him. If, however, it is demonstrated that the trial judge failed to take into account relevant considerations or took into account irrelevant considerations or misdirected himself in law or that his order is plainly unjust, then and then only is this court entitled to interfere with the exercise of discretion.

From the judgment of the court below it is obvious to me and as indicated above that the learned judge erroneously bound himself of a perceived 'direction' from this court in the first appeal. He failed to consider that it was his duty 'to protect the rights of the beneficiaries'. And he also failed to appreciate the legal principle that he should be 'concerned that the price is a reasonable one not at the time the offer was made but at the time of hearing the application for approval of the proposed sale.' With respect I therefore find that the learned judge failed to take into account relevant matters and misdirected himself on the law when exercising his discretion, if he ever did. This is another reason for my allowing this appeal.

Accordingly, I think this is a suitable case which warrants interference by this court in the exercise of discretion by the learned judge in the court below. I would therefore vary the term of the sanction granted. In lieu thereof I would grant the sanction to sell the said land to the 'first to fifth (and seventh) defendants'/respondents subject to its current 'market value at the date' hereof. Effectively, it is the second prayer sought for in the originating summons. And since in this case there was no challenge from the respondents to the valuation report submitted I am of the view that the price as valued should be accepted as the market value.

I have considered the other points taken up in this appeal by both sides, *inter alia*, that the appellant was not a party to the sale and purchase agreement, that the beneficiaries were consulted before the sale, and that in the first suit the issue of the value of the said land was also raised but was not pursued subsequently. In view of the reasons upon which I have come to my decision I do not think these issues could in any way persuade me to alter my conclusion herein. And specifically on the delay in making the application I do not think that should have any prejudicial effect on the interests of beneficiaries to the estate. The application should have been made by the relevant trustees. Thus, if there was any unjustified delay the estate and the beneficiaries should not be made to bear the consequences. In any event in the instant case the fact that there was a dispute on whether the State Government of Penang had released the said land should be taken into account and not for the learned judge in the court below to conclude that '(T)he instant plaintiffs must reap what they sow – the whirlwind.'.

This appeal is therefore allowed in term aforementioned with costs to the appellant to be taxed. The deposit paid is to be refunded to the appellant.